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No. 264

In the Supreme Court of the United States

OCTOBER TERM, 1960

GEORGE LATUS, PETITIONER

v.

UNITED STATES OF AMERICA AND TODD SHIPYARDS CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York is reported at 170 F. Supp. 837. The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 19–23) is reported at 277 F. 2d 264.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1960. A timely petition for rehearing was denied on May 2, 1960, without opinion. The petition for writ of certiorari was filed on July 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, apart from any question of negligence or lack of contributory negligence, a shipowner is absolutely liable for personal injuries sustained by a shoreside employee of an independent ship-repair contractor at a time when the ship was not in the maritime service but was undergoing major reactivation repairs after having been laid up for several years in the "moth-ball fleet."

2. Whether, in the particular circumstances of this case, there is an *in rem* liability on the part of the vessel for the torts of an independent repair contractor over whom the shipowner had no control or supervision.

3. Whether both courts below correctly determined that the shipowner was not negligent in the circumstances of this case.

STATUTE INVOLVED

The Suits in Admiralty Act (Act of March 9, 1920, 41 Stat. 525, 526, 46 U.S.C. 741, *et seq.*) provides in pertinent part:

> Section 1.
>
> No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for

a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this chapter shall not apply to the Panama Railroad Company.

Section 2.

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * *.

Section 3.

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based.

Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder.

STATEMENT

This libel was filed under the Suits in Admiralty Act, 46 U.S.C. 741, *et seq.*, by petitioner Latus, an employee of a ship repair contractor, against the United States as owner of the Liberty Ship, SS ROBERT FULTON (L. 4a).[1] It sought damages for injuries sustained by petitioner when he fell through a hatch on the FULTON, from which the hatch cover had been removed but over which a tarpaulin had been placed. At the time of the accident, November 23, 1951, the vessel was in the process of being reactivated by respondent's employer, Todd Shipyards, after having been laid up for over four years in the "moth-ball fleet." The libel alleged that the vessel was

[1] The letter "L" refers to the libelant's appendix filed in the court of appeals, and the letter "R" refers to the appendix of the United States in that court.

unseaworthy and that employees of the United States had been negligent (R. 1a, 2a).

The United States answered the libel, denying generally the allegations of unseaworthiness and negligence (R. 3a). It also impleaded petitioner's employer—the repair contractor, Todd Shipyards Corporation—demanding reimbursement for any loss and damages resulting from petitioner's suit on the ground that any condition of the FULTON which led to petitioner's injury was the result of Todd's breach of contract in failing to perform its work with the expert care of a professional repair contractor. The United States District Court for the Eastern District of New York dismissed the libel. 170 F. Supp. 837.

On appeal, the judgment of the District Court was affirmed by the Court of Appeals for the Second Circuit, 277 F. 2d 264. Judge Hand, writing for a unanimous court, noted that in *West* v. *United States,* 361 U.S. 118, this Court "authoritatively settled, if indeed it was ever in doubt," that under the circumstances of this case there was no warranty of seaworthiness running to a shore-based employee of the repair contractor. The Court of Appeals further held that, since control had been completely surrendered to the contractor, there was no duty on the shipowner (the United States) to provide the employee with a safe place to work and that *in rem* liability could not be imposed on the vessel. Finally, the court affirmed the District Court's finding of fact that there was no negligence on the part of the United States.

ARGUMENT

1. This Court's recent decision in *West* v. *United States*, 361 U.S. 118, is dispositive of the issues raised in the petition and strips the case of whatever importance it might otherwise have had. *West* held flatly that there is no warranty of seaworthiness running to an employee of a repair contractor who is reactivating a vessel that is not in the active maritime service but has been laid up for several years in the "moth-ball fleet." In addition, the Court held in *West* that, in the absence of power either to supervise or control the repair work in which an injured employee is engaged, the repair contractor, rather than the shipowner, must answer for any injuries caused by defects aboard the vessel created by the work of repair.

Contrary to petitioner's suggestion, the rationale of *Lawlor* v. *Socony-Vacuum Oil Company*, 275 F. 2d 599 (C.A. 2), is wholly consistent with both *West* and this case. In *Lawlor*, the vessel was merely being given an annual overhaul (in the words of the court, p. 601):

> No structural changes in the vessel were to be made, nor did the contract call for anything in the nature of a major or substantial item of change or repair.

Furthermore, as petitioner admits, the vessel had a full crew aboard and the shipowner was in general control of the ship, even if the repair contractor was in control of certain areas in which work was being done. Thus, the operative facts in *Lawlor* are far

removed from those in *West* and in the present case, where control of the ship was completely placed in the repair contractor for reactivation which had not been completed. *Lawlor* and the present case, therefore, are consistent with each other and correctly implement the rule reiterated in *West* as to the extension of the warranty of seaworthiness to shore-based employees (*West* v. *United States*, 361 U.S. at 122):

> It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury. The job analysis which the latter would call for would lead to fortuitous results.[2] * * *

2. Both courts below also properly refused to impose liability *in rem* on the vessel for negligence in circumstances where complete control was in the hands of the repair contractor. Although it is true that, in certain situations, the vessel may be liable even though the owner is not, the concept of a vessel as a "juristic person" or "juridical personality * * * having not only rights but liabilities (sometimes dis-

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[2] This unequivocal language in *West* also shows the lack of merit in petitioner's suggested distinction between the nature of the work he was doing and that performed in *West*. In any event, it would seem that the opening and closing of the hatches in the present case was as necessary to the repair work undertaken by petitioner's employer as was the actual repairing in *West* (R. 34a, 35a).

[3] *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 224.

tinct from those of the owner) which may be enforced * * * against the vessel"[*] has never been extended to grant a lien for negligence to an employee of a repair contractor to which complete control of the ship has been surrendered by the owner. As Judge Hand pointed out below, the two limited situations in which such liability has been imposed are those in which the ship is held responsible for the negligence of a compulsory pilot, *The China*, 7 Wall. 53, and where the vessel is forced to answer for the negligence of a crew hired by a "bare-boat" charterer. *The Barnstable*, 181 U.S. 464. The facts in the present case obviously do not fit either of these two situations. Nor do they afford any justification for extension of *in rem* liability. To the contrary, this Court's opinion in *West* forecloses not only *in personam* liability here, but *in rem* liability as well (361 U.S. at 123, 124):

> It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe. * * *
>
> * * * here the owner had no control of the ship; it had been turned over to a repair contractor for extensive overhaul, which was not performed under the direction of the shipowner. * * * [U]nder the circumstances here the shipowner could not be so chargeable [*i.e.*, for negligence] * * *.

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[*] 1 Benedict, *Admiralty* 3 (6th Ed.).

In this connection, it is significant that petitioner's argument, that there is an absolute and non-delegable duty on the part of the vessel and her owners to furnish persons invited aboard with a safe place to work under facts similar to those in this case, was specifically considered and rejected by the Court in *West* v. *United States*, 361 U.S. 118, 122, 123. The United States, having hired Todd to reactivate the ship, was under no duty to protect petitioner from risks that were inherent in his employer's carrying out of the contract.

3. Petitioner also argues that the Court of Appeals erred in affirming the District Court's factual finding that the sixteen personnel aboard the vessel on the day of the accident were there merely for inspection purposes and that the contractor still had control of the ship. The petitioner is merely trying to substitute his interpretation of the evidence for the more reasonable one of the District Court. But this question does not warrant additional consideration since the Court has repeatedly ruled that it will not go behind concurrent factual findings of two lower courts. See *e.g.*, *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, rehearing denied, 340 U.S. 918; *The Germanic*, 196 U.S. 589. In any event, the record fully substantiates the finding that the sixteen aboard were there primarily for inspection purposes (L. 55a). They were not crew members, and were hired to check out the engines (R. 34a). None of them signed any articles when they came aboard and they had to leave the vessel at

the conclusion of the repair period (R. 34a). The actual sailing crew was hired independently through the Union Hall (L. 48a, 58a). And petitioner is certainly in error in urging that there was no testimony to support the finding that the hatches were being opened and closed continually only by the contractor's employees (R. 37a, 38a). Thus, the challenged findings of fact were not clearly erroneous and were properly affirmed by the Court of Appeals (*McAllister* v. *United States*, 348 U.S. 19).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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